# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## CRIMINAL APPEAL No. 774 of 1997

## WITH

## CRIMINAL APPEAL No. 1014 of 1997

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.L.DAVE**

**HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**VALAND BALDEV JAYANTILAL - Appellant**
**Versus**
**STATE OF GUJARAT - Opponent**

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**Appearance :**
MR.K.B.ANANDJIWALA for Appellant
MR.PRACHCHAK, ADDL.PUBLIC PROSECUTOR for Opponent-State
MR.K.G.DAVE, FOR MR.YOGESH LAKHANI for Respondent

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**CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**

**and**

**HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**

**Date : 19/07/2006**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE A.L.DAVE)**

The appellant in Criminal Appeal No.774 of 1997 came to be tried alongwith respondents in Criminal Appeal No.1014 of 1997 for offence of murder of one Bhadresh Chimanlal Valand allegedly committed by them at about 10:00 p.m. in Bazaar Area of Dhragandhra on 10th June, 1991. According to the prosecution, deceased-Bhadresh and appellant Baldev are cousins. Baldev runs a hair cutting saloon. A few months prior to the incident, Bhadresh had also started a hair cutting saloon in the same area and there was professional rivalry between the two. On the day of incident at about 8:00 p.m., there was some quarrel between the two, but because of intervention of relatives, the dispute was settled. However, after about 2 hours therefrom at about 10:00 p.m. when the deceased was on his way to home after closing the shop, he was intercepted by the original accused persons. There was an altercation and ultimately it is alleged that respondents Ashok @ Lalo and Virendra @ Chako caught hold of the deceased and appellant

Baldev inflicted a blow on the deceased in chest with a sharp edged weapon initially reported to be a knife, but later on found to be a trident of a shape very similar to a knife. After the assault the trio went away. The incident was reported to the father of the deceased, who rushed to the spot, inquired of deceased as to how the incident had occurred and the deceased told him the details of the incident about the names of the assailants, etc. The incident was seen by one Bharat Anantray Vyas. The deceased was taken in an auto-rickshaw to the hospital where he was given treatment and was admitted as injured patient. However, his condition worsened gradually and was referred to Civil Hospital, Ahmedabad. During this time, the Police was informed and Police arrived at the hospital. Executive Magistrate was summoned to record dying declaration which he did. The statement of the deceased was also recorded by police.

2. F.I.R. of Chandulal Bhagvanji was recorded and offence was registered. The Investigating Agency after collecting material found that the material was

sufficient to prosecute the assailants and, therefore, filed charge-sheet in the Court of learned J.M.F.C., Dhragandhra. As the offence was triable exclusively by Court of Sessions, the case was committed to the Court of Sessions Surendranagar and Sessions Case No.109 of 1991 came to be registered.

2.1 Charge was framed at Exh.4. The accused persons pleaded not guilty to the charge and claimed to be tried.

2.2 The trial Court found that the prosecution was successful in establishing the case against original accused No.1-Baldevbhai Jayantilal Valand and therefore, convicted him for the offence of murder and sentenced him to undergo imprisonment for life and to pay a fine of Rs.250/-, in default thereof, to undergo simple imprisonment for one month. The trial Court also found that the prosecution could not establish case against the accused Nos.2 and 3 viz. Ashok @ Lalo Baldevbhai and Virendra @ Chako Baldevbhai beyond reasonable doubt and therefore recorded their acquittal.

2.3 Aggrieved by the order of conviction, original accused No.1 has preferred Criminal Appeal No.774 of 1997 and is represented by learned Advocate, Mr.Anandjivala.

2.4 Aggrieved by the order acquitting original accused No.2-Ashok @ Lalo Baldevbhai and accused No.3-Virendra @ Chako Baldevbhai, the State has preferred Criminal Appeal No.1014 of 1997. The State is represented by learned A.P.P., Mr.Prachchak and learned Advocate, Mr.Lakhani appears for respondents in that appeal i.e. for original accused Nos.2 and 3.

3. Learned Advocate, Mr.Anandjiwala, for the appellant in Criminal Appeal No.774 of 1997 submitted that the version given by the eye-witnesses to the incident is not reliable. Eye-witness, Chandulal Bhagvanji gives different story in examination in chief and in cross-examination. Likewise, Prosecution Witness No.6, Bharat Anantray Vyas (Exh.23) who also claims to be eye-witness has not supported the prosecution case and has been declared hostile.

3.1 Mr.Anandjiwala, submitted that there are two written dying declarations placed on record. One dying declaration is recorded by the Executive Magistrate. Whereas, the other dying declaration is in form of statement of the deceased recorded by Police. Mr.Anandjiwala submitted that these two dying declarations do not inspire any confidence. It has come on record that general condition of the deceased was poor that he was given sedative drug that he was breathless because of injury and, therefore he could not have given the dying declaration recorded either by the Executive Magistrate or by the Police.

3.2 Mr.Anandjiwala, submitted that the Investigating Agency has not acted in a free, fair and unbiased manner. Investigation suffers from a large number of lacuna. He submitted that there is discrepancy about the time as to when the F.I.R. was recorded. The Investigating Agency has not investigated on aspect of the identity of the assailants. It is not clear as to at what time the

F.I.R. was recorded and, therefore, the trial Court ought not to have accepted the evidence of the prosecution.

3.3 Mr.Anandjiwala, submitted that the trial Court has in-fact criticized the investigation and the trial Court has recorded conviction on basis of very piece of evidence, which is otherwise criticized by the trial Court. Mr.Anandjiwala, therefore, submitted that the appeal may be allowed and conviction may be set aside.

3.4 By way of an alternative submission, it is submitted by learned Advocate, Mr.Anandjiwala that the evidence even if taken at face value would indicate that the incident occurred all of a sudden and because of professional rivalry, there was an altercation and in heat of passion only one blow is given by the appellant-original accused No.1 and therefore, he cannot be convicted for murder and therefore, even if his involvement in the incident is found acceptable, the Court may alter the conviction from one under Section 302 to one under Section 304

(Part-II) of the Indian Penal Code.

4. Learned A.P.P., Mr.Prachchak, has opposed the appeal. According to him, there is ample evidence on record to implicate the convict-appellant, as well as, acquitted respondents. He has drawn our attention to deposition of Chimanlal Sundarji and Tribhovan Sundarji. According to Mr.Prachchak, the dying declaration is recorded by an independent Officer like Executive Magistrate. Nothing emerges from record to show that the Executive Magistrate may have any bias or enemies against the convict-appellant or the acquitted respondents and, therefore, the dying declaration has rightly been relied upon by the trial Court and this Court may also accept the dying declaration.

4.1 Mr.Prachchak, submitted that though eye-witness, Bharat Vyas has not supported the prosecution case, the contradiction is proved through the deposition of Investigating Officer and, therefore, the conviction may be confirmed.

5. Learned A.P.P., Mr.Prachchak, while addressing the Court in respect of acquittal challenged in Criminal appeal No.1014 of 1997 submitted that deposition of Chimanlal Sundarji and Tribhovan Sundarji and the fact that the clothes of respondent-original accused No.2-Ashok @ Lalo were found to be blood stained, the trial Court ought to have relied on the dying declaration and the recovery of clothes and finding of the F.S.L. as regards the blood marks on the clothes and ought to have recorded conviction. According to Mr.Prachchak, respondents in Criminal Appeal No.1014 of 1997 ought not to have been acquitted. Mr.Prachchak, submitted that blood stained clothes of accused No.1-Ashok @ Lalo has been recovered which would fix his identity. It has come on evidence that they caught hold of the deceased when incident occurred and therefore, they may be convicted of the offences with which they were charged.

5.1 Mr.Prachchak, submitted that the incident occurred at about 10:00 p.m. in the evening in Bazaar Area of Dhragandhra Town. The parties involved are

known to each other and therefore, there was no question of mistaken identity of the assailants. The identity of original accused Nos.2 and 3 has been properly established by the prosecution, if depositions of Chimanlal Sundarji, Tribhovan Sundarji and Bharat Vyas are seen. Mr.Prachchak, submitted that the trial Court has given undue weightage to the absence of official names of original accused Nos.2 and 3 in the evidence, but there is ample evidence to fix the identity of accused Nos.2 and 3 by evidence in form of their place of work and relationship. Mr.Prachchak, submitted that Criminal Appeal No.1014 of 1997 may be allowed and acquittal may be set aside and respondents be convicted for offence of murder punishable under Section 302 read with Section 34 of the Indian Penal Code.

6. Mr.Dave, learned Advocate, appearing for respondents in Criminal Appeal No.1014 of 1997 (original accused Nos.2 and 3) submitted that the trial Court has appreciated the evidence and has come to a conclusion that the evidence in respect of identity of original accused Nos.2 and 3 is not

properly established by the prosecution. Mr.Dave, submitted that there is discrepancy in respect of names of these persons. Throughout the evidence they have been referred to by their nicknames and there is no material to show that the nicknames are that of accused Nos.2 and 3. Mr.Dave, also submitted that there is discrepancy about name of original accused Nos.2 and 3 in the dying declaration, as well as, evidence of eye-witnesses. The dying declaration is not referred to accused No.3 at all, whereas, the witnesses have referred to accused No.3 as Chako or Chiko at different places. So far as accused No.2 is concerned, there is reference to Lalo, who was working with the deceased and Lalo who was working in Jolly Hair Cutting Saloon which are two different places of employment. As regards the blood stained clothes of accused No.2, Mr.Dave, submitted that Panch Witnesses to recovery Panchnama have not supported the prosecution case and have been treated as hostile witnesses. He also submitted that when the trial Court has, after considering these aspects recorded acquittal and when that view cannot be considered as absurd or impossible one, this Court

may not interfere in the order of acquittal and appeal may therefore, be dismissed.

7. We have examined the record and proceedings from the angle suggested by learned Advocates and learned A.P.P., appearing in the matter.

8. Initially, when the matter was listed and hearing started on 6th July, 2006, we found that the weapon used in the offence is trident as per prosecution. We also found that only one injury is allegedly caused and only one injury was noticed by the doctor, who gave the treatment and who performed the postmortem. It was also noticed by us that the injury was deep by about 8.5 C.M. and therefore, if the weapon which was used in the alleged offence was usual trident, it would be reasonable to expect two other parallel injuries with the main injury that would be caused by the side blades unless central blade of trident is longer than the side blades by more than 8.5 centimeters. We also noticed that there was change in description of the weapon at a later stage. Initially, it was suggested that the

weapon was used was knife and then trident was introduced by the prosecution witnesses. We, therefore, deemed it proper to inspect the weapon to facilitate a just decision of the appeals.

8.1 By an order dated 6/7/2006 we directed the Registry to call for the muddamal Article No.5, the weapon used in the incident through a special messenger. The weapon was duly received by the Registry and during the course of hearing we have inspected the weapon.

8.2 We find that the weapon is a trident, but unlike conventional trident, three blades are so designed that one can mistake the trident for a knife if it is seen from a distance, more so, if it is seen in late evening hours because of less light.

9. Prosecution has examined Dr.Pragnaben Harin Vadodaria at Exh.10 and Dr.Vinayak V. Patil at Exh.14 as medical witnesses. Dr.Vadodaria had treated the deceased and Dr.Patil had performed the postmortem. The postmortem notes are at Exh.15. Though only one

in number, we find that the injury is caused on vital part of the body viz. chest. The dimensions of injury are 3.7 c.m. x 2 c.m. x 8.5 c.m. in depth. The weapon has pierced through the chest from the intercostal space between 7th and 8th ribs and has caused injury to ribs, left lung, pleura, etc. It was noticed that air was coming out of the wound as the patient breathed. The doctor has opined that the injuries were possible with muddamal article No.5, trident. It is also stated by the doctor that the injury was sufficient in ordinary course of nature to cause death. We do not find any error on part of the trial Court in coming to the conclusion that the death of deceased was homicidal.

10. The question therefore would be as to who can be attributed with the injury.

11. In this regard, the prosecution has examined Bharat Anantray Vyas at Exh.23. He claims to be an eye-witness to the incident. He turned hostile to the prosecution and did not support the prosecution case. The prosecution has, however, cross-examined

him and has tried to prove his original version implicating the accused person through Investigating Agency.

11.1 The prosecution has then examined first informant-Chandulal Bhagvanjibhai at Exh.17. He also claims to be a press reporter. He says that he had gone to the shop of the deceased for a shave at about 9:30 p.m. on the day of the incident. After having a shave, when he left the shop at about 10:00 p.m., he saw that deceased-Bhadresh Chimanlal and Baldev Jayantilal, Lalo and Chako were quarreling. He identified the accused persons as Baldev Jayantilal, Lalo and Chako in the Court. He says that Lalo and Chako are employees of Baldevbhai. He overheard accused No.1 Baldevbhai addressing deceased Bhadresh as to why he is enticing his customer and in the process there was an altercation, ultimately accused No.1 asked accused Nos.2 and 3 to catch hold of the deceased, brought out a knife from his waistband which was like a trident and inflicted blow on Bhadresh on left side resultantly Bhadresh fell down, people gathered, one of whom was Bharat Vyas, he

asked Bharat Vyas to summon auto-rickshaw for taking Bhadresh to the hospital and then sent Bhadresh to the hospital in auto-rickshaw. The witness thereafter went home and after taking a vehicle he went to the hospital. On arrival of Police, he gave the first information report.

11.2 The witness has been cross-examined and it is revealed from the cross-examination that he is an accused in number of cases. He is also complainant in a number of cases. He was also closely associated with the Police as a Press Reporter. He is fond of reporting sensational news.

11.2.1 It is noticed from his cross-examination further that he gives a total go-by to what he stated in his examination in chief and admits that he does not know as to who caused injury to whom. The witness has stated that whatever he stated in his examination in chief was because he was asked to do and what is stated by him during cross-examination is the truth. He has also stated in his deposition that the deceased was not in a position to

give dying declaration and he had informed the Mamlatdar about the incident on basis of information given to him by others. He says the same thing in respect of F.I.R. lodged by him where he states that he disclosed name of the accused persons in the F.I.R. on basis of whatever was disclosed by people in the hospital. Thus, deposition of Prosecution Witness No.3, Chandulal at Exh.17 and Prosecution Witness No.6, Bharatbhai at Exh.23, who claim to be eye-witnesses does not carrying in the prosecution any further.

12. Witness Chimanlal Sundarji Exh.20 and Tribhovan Sundarji Exh.21, who happened to be father and uncle of the deceased respectively are important witnesses, though they are not eye-witnesses. They reached the spot on being informed about the incident. They claim that Chandulal asked the deceased as to how the incident occurred and deceased told them Baldev Jayanti, Lalo and Chako had assaulted him and caused the injury when Chiko and Lalo caught hold of him and Baldev inflicted the knife blow. The deceased also told them that this

was because of professional rivalry.

12.1 Chimanlal Sundarji during cross-examination has stated that he knows Chika and Lala by that name even before the incident. He says that he knows them because Chiko and Lalo were working in the shop of his brother-in-law. Then, he states that at the time of the incident Lalo was working with Vinod in Jolly Hair Cutting Shop.

13. Executive Magistrate, Bhudarbhai Maganbhai is examined at Exh.36. He says that on receiving Yadi he went to the hospital and recorded the dying declaration. He says that he recorded the dying declaration between 12:15 and 12:30 midnight. He has further stated that recording of dying declaration was over, he obtained endorsement and signature of the doctor. The dying declaration is at Exh.38. Witness has been cross-examined at length. He in terms states that he was satisfied about the ability of the patient to give dying declaration. He admits that in the dying declaration, name of Baldevlal is written and then word Lala is scored out. Witness

has stated that this was done at the instance of the declarant. He has further not made any endorsement to this effect, nor does he make any initial. He denies suggestion that the deceased did not give any dying declaration, that Police Inspector was present when he was recording dying declaration, that as there was discrepancy in the dying declaration and statement of witness the Police Inspector was required to take another dying declaration. Witness during cross-examination also says that the patient was able to speak like a normal person, that he was not breathing heavily, that he was not speaking intermittently, he asserts that the patient was speaking clearly and was understandable.

14. Prosecution Witness No.20, Jaggannath Sitaram More is examined at Exh.40. He says that he was the Investigating Officer. He took F.I.R. (Exh.18) from Chandulal Bhagvanji. He had sent yadi to Executive Magistrate for recording dying declaration. He says that he had recorded statement of deceased-Bhadresh (Exh.41).

14.1.1 Witness has been cross-examined. He asserts that when he recorded the statement, Bhadresh was conscious. He denies suggestion that the details in the statement of Bhadresh were in-fact given by his father. He also denies that statement of Bhadresh was recorded on the next day. He says that he had consulted the doctor before recording the statement of Bhadresh. However, he did not obtain any certificate from the doctor about fitness of the declarant to give declaration. He did not see the doctor on the second occasion. Statement at Exh.41 of the deceased was written by his Clerk, Ghanshyamsinh under his supervision. He says that Bhadresh was speaking intermittently. His condition was serious. However, he did not deem it proper to summon the doctor. He says that he had not taken signature or thumb impression of deceased in his statement (Exh.41). The witness also deposes about the other aspect of investigation including arrest of the accused persons, recovery of clothes, etc.

15. From the above evidence what emerges is that though the eye-witnesses have not supported the

prosecution case, there is strong piece of evidence in form of dying declaration before Executive Magistrate. In that dying declaration, the deceased says that while he was returning home from his place of work, there was a quarrel with 1) Baldev, 2) Lalo and 3) Baldev Jayantilal. He says that trio came from behind, caught hold of him and Baldev Jayantilal inflicted knife blow. He also states that shop of Baldev Jayantilal is located just opposite of his own shop. Baldev and Lalo work over there and they used to pelt stones at his shop which was the cause for quarrel.

15.1 It is thus clear from the dying declaration that the deceased specifically involved Baldev Jayantilal original accused No.1. The statement before the Police (Exh.41) also clearly implicates Baldev Jayantilal original accused No.1. It emerges from evidence that when the dying declaration was recorded by the Executive Magistrate, the Executive Magistrate found declarant to be in a conscious and fit state of mind. It also appears that doctor was present when the dying declaration was recorded by

the Executive Magistrate. The dying declaration contains endorsement of the doctor that the patient was conscious to give proper answers. Dr.Vadodaria (Exh.10) also confirms and corroborates this version of the Executive Magistrate. Dr.Vadodaria and Executive Magistrate, Bhudarbhai are independent witnesses and have no reason to falsely implicate any one. Recording of dying declaration by the Executive Magistrate cannot be doubted as we do not find any defect or fault in the method of recording the dying declaration. The dying declaration before the Executive Magistrate and statement before the Police (Exh.41) which can also be treated as dying declaration are consistent about involvement of original accused No.1, Baldev Jayantilal. It transpires therefrom that original accused No.1 inflicted knife blow on the left side of chest which caused the fatal injury which was sufficient in ordinary course of nature to cause death. We are therefore of the view that the trial Court was justified in coming to the conclusion that appellant / original accused No.1 was involved in the incident and caused fatal injury to the deceased.

16. Now comes question whether original accused No.1 could have been convicted for offence of murder.

16.1 In this regard, it may be noted that about two hours prior to the incident, there was a quarrel between the parties and the parties were separated and dispute was resolved because of intervention of elderlies. It has come in evidence that there was professional rivalry between the deceased and original accused No.1 for which they had been having disputes off and on. When the incident occurred, the deceased was going to his residence after the day's work was over and original accused No.1 gave a (trident) knife blow. We have examined the trident and we are of the opinion that the weapon is not of a type which one may ordinarily carry with him. Original accused No.1 had no reason to carry such a weapon with him. He has given a blow on vital part of the body with such force that the weapon pierced through the intercostal space damaging ribs, cutting the pleura, as well as, left lung. The wound is 8.5 c.m. deep. For a person having dispute with the

deceased for quite sometime in past and having had a quarrel about two hours before the incident and then committing this assault without any provocation or cause being given to him, there cannot be any other inference but the inference that he had intention to cause death of the deceased. He gets armed with a peculiar weapon and uses it with a force on vital part of the body of the deceased. Any person would know the effect of such a blow on vital part of body. There is no ambiguity whatsoever in this regard. This incident occurred in absence of any cause at the hands of the accused. We are, therefore, of the view that the trial Court was justified in convicting original accused No.1 for the offence of murder and we do not see any reason to interfere with the same. There are no circumstances which may attract any of the exceptions to bring the case out of the definition of murder. Criminal Appeal No.774 of 1997 therefore, must fail and stands dismissed.

16.2 We notice that a complaint under Section 51 (1) (b) of the Prison Act has also been lodged against the appellant in Criminal Appeal No.774 of

1997.

17. Now coming to the appeal preferred by the State. As discussed above, we find that the evidence against original accused Nos.2 and 3 is in form of dying declaration before the Executive Magistrate, before Police and oral dying declaration before Chimanlal (Prosecution Witness No.4). In all these dying declarations reference to original accused Nos.2 and 3 is by their nicknames. No other details are available. The witnesses also referred to accused Nos.2 and 3 by their nickname viz. Lalo and Chiko. Accused No.3 is referred at some places as Chiko. Investigating Agency has not taken any steps, has not collected any evidence to show that accused Nos.2 and 3 were known by those nicknames.

17.1 As regards accused No.2-Lalo, it emerges from evidence of first informant-Chandulal (Exh.17) that he was working with Vinod-son of the witness, who was working with Jolly Hair Art. It has also come in evidence that Lalo has been working with accused No.1-Baldev Jayantilal.

17.1.1 It was pointed out by learned A.P.P. that clothes of accused No.2 are found to carry blood marks of the group of the deceased but, we find that the recovery is not supported by independent witnesses. Panch Witnesses have not supported the recovery. We find that the Investigating Agency has not carried out the investigation in a satisfactory manner. The doubt raised by the trial Court regarding identity of accused No.2 has justifiable foundation and when the independent witnesses have not supported the prosecution case, we do not propose to run the risk of accepting the deposition of the Investigating Officer to set aside the acquittal.

17.2 Likewise in respect of accused No.3, there is not reference to his name in the dying declaration recorded before the Executive Magistrate. Witnesses referred to him as Chako or Chiko at different places. The independent witnesses have not supported the prosecution case and, therefore, in our opinion, he also has been rightly acquitted by the trial Court by giving benefit of doubt.

18. When the prosecution case against accused Nos.2 and 3 is not supported by independent witnesses, when the dying declaration on basis of which conviction is recorded by the trial Court and confirmed by this Court in the foregoing paragraphs does not clearly implicate accused Nos.2 and 3, when their identity is not properly established, when there is total lack of evidence to show that accused Nos.2 and 3 were shown by their nickname and that the nicknames referred to by the deceased or witnesses were in respect of accused Nos.2 and 3 only, in our opinion the trial Court was justified in giving benefit of doubt. We do not propose to interfere with that order by allowing appeal against the acquittal preferred by the State. The view taken by the trial Court is not an impossible one and Criminal Appeal No.1014 of 1997 preferred by the State therefore, must fail and stands dismissed. For the reasons recorded in the foregoing paragraphs, both the Appeals fail and are dismissed.

19. The Registry shall send back muddamal

Article No.5 to the trial Court for disposal in accordance with law.

***(A.L.DAVE, J.)***

***(BANKIM N. MEHTA, J.)***

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